IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Bikaner Khadi & Oon Katai Bunai Sahkari Samiti Ltd.
vs.
Employees State Insurance Corpn. and another.

S.B. Civil Misc. Appeal No.553/1994
against the order dated 13.7.1994
passed by ESI Court, Bikaner.

Date : 19.10.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Amit Mehta for Mr.RR Nagaori, for the appellant.
Mr. SK Punia, for Mr.S Mathur, for the respondent.

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Heard learned counsel for the parties.

The present appeal is against the order dated 13.7.1994 by which the Employees State Insurance Court dismissed the appellant's petition under Section 75 of the Employees State Insurance Act, 1948 (for short 'the ESI Act').

Brief facts of the case are that a demand was raised against the appellant for a sum of Rs.13,871/- on the ground that on inspection, the total number of employees working at the appellant's unit was found to be more than 20 and the appellant did not deposit the contribution under the ESI Act for the employees. Said demand was challenged

by the appellant by filing petition under Section 75 of the ESI Act.

Learned counsel for the appellant vehemently submitted that it was the burden of the ESI department to prove that the appellant's unit is covered under the provisions of the ESI Act. Learned counsel for the appellant relied upon the judgment of this Court delivered in the case of M/s. Ravindra Industries, Bhilwara vs. The Employees State Insurance Corporation (S.B. Civil Misc. Appeal No.113/1987) decided on 27.4.2000. According to learned counsel for the appellant, the court below wrongly drawn adverse inference against the appellant because of non-production of the register of the employees of the appellant. The reason for drawing adverse inference was that according to the respondent department, at the time of inspection, the Inspector checked the registers of the appellant's unit and found that there are more than 20 employees in the appellant's unit. The said register was not produced by the appellant in court below.

According to learned counsel for the appellant, the appellant tried to produce the register but his application seeking permission to submit register was wrongly denied by the ESI Court. The appellant challenged the order of ESI Court refusing permission to produce the attendance register by filing revision petition (S.B. Civil Revision Petition No.240/1986). The appellant's revision petition was held to be not maintainable by this Court vide order dated 23.7.1986. The appellant prayed that the revision

petition may be converted into writ petition but that prayer was also not allowed. The petitioner preferred writ petition no.1991/1986 to challenge the order of ESI Court before the Division Bench of this Court. The Division Bench though dismissed the petitioner's writ petition no.1991/1986 by order dated 13.5.1988 but while dismissing the writ petition observed that the appellant is free to produce the said register when the department's witnesses came in evidence so that he can cross examine the witness and can use the register for refreshing the memory of the department's witnesses. In view of the above, the court below committed error in drawing adverse inference against the appellant. It is also submitted that the Inspector who inspected the site of the appellant's unit was not produced by the department, therefore, they failed to discharge their burden of proving the basic fact of covering the appellant's unit under the ESI Act.

I considered the submissions of learned counsel for the appellant and perused the record also.

It is clear from the facts pleaded by the appellant itself that the foundation of the claim against the appellant was the inspection conducted by the Inspector of the ESI department and in report, he has mentioned that he found more than 20 employees working in the appellant's unit. The department also relied upon the register of the appellant's unit as well as other documentary evidence. It is not in dispute that said register was not produced by

the appellant in time before the court below and he was not permitted to produce the register subsequently. The appellant challenged the order of the court below but a bare perusal of the order passed by the High Court in the revision petition no.240/1986 preferred by the appellant, it is clear that the revision petition was not only dismissed as not maintainable but thereafter, after considering the appellant's prayer for converting the said revision petition into writ petition. This Court held that even if it is converted into writ petition, this Court is of the view that there is no merit in the challenge to the order of ESI Court. Be it as it may be, still the appellant preferred writ petition before the Division Bench. The Division Bench of this Court in its judgment dated 13.5.1988 clearly held after the dismissal of the writ petition that even if the revision petition is treated as writ petition, then also there is no merit, concludes the matter finally. However, while dismissing the writ petition, the Division Bench observed that since Civil Procedure Code applies, the appellant still has opportunity to produce the register when the witness of the respondent department comes for evidence so that the appellant may use the register for refreshing the memory of the witness in case he denies the questions which may be raised by the appellant.

Admittedly, said register was not produced despite the fact that the respondent's witness came to give evidence after the division bench's decision on 20.4.1993.

Learned counsel for the appellant submitted that the

person who inspected the appellant's unit did not come in the witness box, therefore, the appellant could not have produced the said register.

Once the order denying the permission to produce the register is upheld by this Court, by Single Bench as well as Division Bench, this Court now in appeal cannot re-examine the legality and correctness of the order which has been upheld by this Court twice on earlier occasions.

Be it as it may be, another fact is that the court below has not based its entire judgment only on the adverse inference against the appellant which is apparently clear from the impugned order passed by the court below. The court below rightly relied upon the statement of DW1 Krishna Kumar who produced documents which were written by the appellant to the department wherein the appellant showed the number of employees working in the unit. As per Ex.3A, the number of employees working in the appellant unit were 21 from 1.11.1979 to 29.3.1980, 21 from 30.8.1980 to 27.9.1980, 21 from 29.9.1980 to 28.3.1981, 21 from 29.9.1991 to 28.9.1981. Apart from above, the court below also took note of the fact that when on earlier occasion, the demand was raised against the appellant, the appellant himself deposited Rs.2,096/-. For this, learned counsel for the appellant submitted that the said amount was deposited under protest. However, it appears from the statement of the appellant's witnesses that an attachment order was issued against the appellant and when the Tehsildar went to attach the property of the appellant, then the appellant

deposited the amount of Rs.2,096/-.

Since it is not a case of passing any order merely on the basis of drawing adverse inference on the basis of non-production of the register but is based on other evidence.

In view of the above, this appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya